MALAYSIAN REPORTS

LYL HOOKER SDN. BHD. v. TEVANAIGAM SAVISTHRI & ANOR.

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C. JJ.) May 13 & 16, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 154 of 1985]

Contract – Building Contract – Sale and purchase agreement for sale of house under construction – Vendor a housing developer – Assignment by purchaser of his rights, title, interest and liabilities with consent of vendor – Delay in completion of house – Claim for compensation – Whether there was novation of contract.

Housing Developers – Purchaser assigning rights etc. – Delay in completion.

In this case the appellant company, a housing developer, signed a sale and purchase agreement on May 5, 1977 with one Yeo Tiang Chin, who purchased a house then under construction. The agreement provided that the appellant company must complete the house and deliver vacant possession not later than eighteen months after the date of the contract that is, on or about November 9, 1978 and also that no assignment was permitted without the consent of the appellant company. On November 29, 1978 Yeo Tiang Chin executed a deed of assignment transferring all his "rights, title, interest and liabilities" under the sale and purchase agreement to the respondents. The assignment was consented to by the appellant company. There was a delay in the completion of the house and vacant possession was not delivered till April 30, 1980. The respondents sued the appellant company for compensation under the agreement. The action was dismissed by the learned Magistrate but on appeal the High Court reversed the decision. The learned Judge gave leave to appeal to the Supreme Court. It was argued by the appellant company that the 18 months period within which vacant possession must be given to the respondents should commence not from the date of the sale and purchase agreement but from the date of assignment November 29, 1978 and that since vacant possession was delivered on April 30, 1980, there was therefore no delay and no compensation was payable. They submitted that the deed despite its description was not in law an assignment but a new contract (novation).

Held: the deed of assignment in this case was an assignment and therefore the appeal must be dismissed.

SUPREME COURT.

John Fam for the appellant.

Victoria Y.K. Ng for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This appeal originated from the decision of Magistrate, Kuala Lumpur, which Harun J. reversed. He then gave leave to appeal to us. Neither the magistrate who has since left the service nor the judge has given any grounds for their decisions.

The facts are straight forward. The appellant company are a housing developer. On May 10, 1977 they signed a sale and purchase agreement with one Yeo Tiang Chin who purchased a unit of double-storey link house, then under construction. Clause 6 of the agreement stipulates that the appellant company must complete the house and deliver vacant possession not later than 18 months thereafter, *i.e.* on or about November 9, 1978, and under clause 22 no assignment is permitted without the consent of the appellant company.

On November 29, 1978 Yeo Tiang Chin executed a deed of assignment transferring all his "rights title interest and liabilities" under the sale and purchase agreement to the respondents for a consideration of $12,200.00. The assignment was consented to by the appellant company. At the time of the execution of the deed the house was still under construction and it was not until on or about April 30, 1980 that it was completed and vacant possession delivered. Because of this delay the respondents sued the appellant company for compensation under clause 6 of the agreement.

Throughout the proceedings before the courts below and before us the appellant company maintained that the 18 months period within which vacant possession should be delivered to the respondents should commence not from the date of the sale and purchase agreement but from the date of assignment November 29, 1978 and that since vacant possession was delivered on April 30, 1980 which is well within the 18 months period, there was therefore no delay and as such no compensation under clause 6 is payable. Counsel for the appellant company submitted that the deed despite its description is not in law an assignment but a new contract (novation). Two reasons were advanced for this proposition. First, because the appellant company consented to the assignment the assignment therefore became a novation. Secondly, as at law assignment is not permissible to the transfer of liability, the deed must therefore be a novation.

As regards the first objection, consent was required in this case because clause 22 of the sale and purchase agreement insists that for an assignment to be valid consent of the appellant company is required. In our view, that consent does not

render the deed any less than an assignment which is what the parties intended. Consent operates no more than a legal recognition by the appellant company of the validity of the transfer of rights from the assignor (Yeo Tiang Chin) to the respondents and that consent binds them.

Referring to the second objection, there seems to be a confused thinking here. What was transferred from the assignor to the respondents in so far as the matter in issue is concerned, was not liability but a right to have vacant possession of the house delivered within eighteen months from the date of the sale and purchase agreement. The appellant company's liability to deliver vacant possession within that period remained with the appellant company and was not transferred to any one else, though in the discharge of this obligation it has to deliver it to the respondents instead of to the assignor (the original purchaser). This is what the assignment is all about. Moreover, for the deed to amount to a novation, the appellant company must show that there was consideration moving between them and the respondents. Here they fail to do so.

Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished. (See *Chitty* on Contract, Vol. 1, 1983 edition at paragraphs 1315 and 1316).

Looking at the deed we fail to find anything which suggests extinguishment of rights and obligations under the sale and purchase agreement. There is nothing either to show any consideration moving between the appellant company and the respondents, which is a vital requirement for a novation.

We therefore hold that the deed of assignment dated November 29, 1978 was an assignment. This appeal is dismissed with costs. We order that the appeal deposit be paid to the respondents towards taxed costs.

Appeal dismissed.

Solicitors: *A.K. Lee & Co.; Y.K. Ng & Co.*

TAN LIN SIEW & ANOR. v. SYED HUSSEIN BIN ALWI

[S.C. (Wan Suleiman, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) July 9 & September 9, 1986]

[Kota Bharu – Supreme Court Civil Appeal No. 69 of 1984]

Torts – Negligence – Road accident – Quantum of damages – Pre-trial loss of earnings not pleaded – Future loss of earnings – Damages for pain and suffering – General and special damages – Pleading.

Damages – Leg – Shortening 1" – 30% disability – Pain and suffering – Loss of earning.

In this case the respondent who was riding a bicycle was knocked down by the first appellant who was driving a motor car in the opposite direction. As a result he suffered a trochanteric fracture to his left femur which resulted in a 1" shortening of his left leg. The learned trial judge recorded the injuries as follows:

"(a) 30% permanent disability,

(b) 1" shortening of left leg;

(c) Unfit for jobs that require continuous use of both lower limbs"

The learned trial judge also found as follows :

"After the accident his wife and one of the sons help him to tap the rubber trees. The plaintiff is now 43 years old. He met the accident on December 2, 1978 when he was about 39 years old.

Up to the date of accident (December 2, 1978) plaintiff alone was tapping the rubber trees on the land allotted to him, right from the day he became a settler. His net income before the accident was :

i) in 1977 – $3,408.53

ii) in 1978 – $3,316.71

His net income after the accident with his wife and son working are :

i) 1979 – $2,818.00

ii) 1980 – $4,556.00

iii) 1981 – $4,594.00 (skipping the cents)

For 1 year after the accident (*i.e.* from December 1978 to December 1979) he could not work at all. Now, he can only assist his wife and son.

Plaintiff has to give money to his son as a wage otherwise he would not work. He gives 1/3 of the income to his son. And if his son does not want to work he has to engage someone to do the work. His earning will be ¼ of joint earning with the wife after deducting 1/3 to his son."

The learned trial Judge had to decide only on the question of quantum, 100% liability having been conceded by the appellants. His award was as follows :